No. 77-1586

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In the Supreme Court of the United States

OCTOBER TERM, 1978

ROGER L. KEECH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners seek review of the decision below enforcing an internal revenue summons for the production of bank records on the ground that the summons was issued solely for purposes of a criminal investigation and that they were entitled to an evidentiary hearing on this claim.

The pertinent facts are as follows: In February 1977, Special Agent Alexander Dombroski of the Intelligence Division of the Internal Revenue Service

was assigned to a joint investigation with the Audit Division of petitioners' income tax returns for 1973-1975. Thereafter, on June 17, 1977, Dombroski issued a summons requiring Morgan Guaranty Trust Company to produce records relating to petitioners' transactions with the bank. Pursuant to 26 U.S.C. 7609(b)(2), petitioners exercised their right to stay compliance with the summons by directing the bank not to comply (Pet. App. A, pp. 3a-4a, 6a).

The government thereupon brought this summons enforcement proceeding in the United States District Court for the Southern District of New York pursuant to 26 U.S.C. 7402(b) and 7604(a). Petitioners intervened in the proceeding and filed an affidavit alleging that the special agent had stated that he was conducting a "criminal investigation of Roger Keech" (Pet. App. A, pp. 2a-4a).

The affidavit filed on behalf of petitioners was executed by William G. Woolridge, a tax accountant in the employ of Chromalloy American Corporation. Woolridge stated that he had met with Internal Revenue agents, including Special Agent Dombroski, at the office of Arrow Group Industries, Inc., a Chromalloy subsidiary of which petitioner Roger Keech was president. Woolridge alleged that as Special Agent Dombroski left the Arrow premises with Arrow records that he had previously requested in connection with his investigation of petitioner, an unnamed Arrow employee asked whether production of the records cleared up everything with respect to Arrow. Dombroski allegedly "responded in the affirmative

and further stated, in substance, that his only remaining interest was in his criminal investigation of Roger Keech" (Pet. App. A, p. 5a).

The government responded with affidavits of Special Agent Dombroski and of Charles Lazarus, an Internal Revenue agent in the Audit Division, which is responsible for civil enforcement. Dombroski stated that he had been assigned to investigate petitioners' tax returns for 1973-1975 jointly with the Audit Division; that the investigation had not yet progressed sufficiently to warrant a decision whether or not to recommend criminal prosecution to the Department of Justice; and that even if he determined not to recommend prosecution, the Audit Division would still be required to determine whether petitioners were liable for additional taxes and civil fraud penalties. Dombroski acknowledged that he told an Arrow employee that he regarded Arrow as having satisfied the summons issued to it but that his investigation of petitioner Roger Keech was ongoing. While Dombroski denied using the term "criminal" to characterize his investigation of Roger Keech, he stated that "in point of fact the joint investigation is criminal as well as civil in nature" (Pet. App. A, p. 6a).

Agent Lazarus' affidavit confirmed the Audit Division's participation in the joint investigation. He stated that he was familiar with the file and that it contained a) no determination whether petitioners had unreported income for the years in question; b)

no determination whether to recommend criminal prosecution of petitioners; and c) no determination whether petitioners were liable for additional taxes and civil fraud penalties. Lazarus further stated that given the status of the joint investigations, there were two potential future dispositions. First, Agent Dombroski could recommend prosecution, in which event Lazarus would submit a revenue agent's report computing the additional taxes due. The submission of this report would end Lazarus' involvement in the matter at least until disposition of the criminal aspect of the investigation. Second, Special Agent Dombroski could determine that the facts did not warrant the recommendation of prosecution, in which event the matter would be returned to Agent Lazarus for a determination whether to recommend the assessment of additional taxes and civil fraud penalties (Pet. App. A, p. 7a and n. 4).

After hearing oral argument, the district court ordered enforcement of the summons (Pet. App. A, p. 7a; Pet. App. C, pp. 19a-20a). The court of appeals affirmed (Pet. App. A, pp. 8a-16a). In its view, this Court's decision in *Donaldson* v. *United States*, 400 U.S. 517, established an objective test—"prior to recommendation for criminal prosecution"—that would avoid a need for determining the thought processes of special agents. The court construed the requirement of *Donaldson* that the summons be issued in "good faith" to render unenforceable a summons that was an abuse of the court's process, *viz.*, harassment or improper pressure upon the taxpayer (*United*

States v. *Powell*, 379 U.S. 48, 58) (Pet. App. A, p. 13a).

The court of appeals further held that even if the *Donaldson* good faith requirement would render unenforceable a summons issued solely for purposes of a criminal tax investigation, "petitioners made no showing sufficient to call for an evidentiary hearing or discovery on whether the summons was to be used solely to develop evidence for prosecution" (Pet. App. A, p. 14a). As the court observed, both Special Agent Dombroski and Agent Lazarus swore that their interest was in determining whether there was a deficiency in petitioners' tax liabilities that may be the basis of a civil recovery, with or without fraud penalties, a criminal prosecution, or both. Moreover, even assuming Dombroski said that his only remaining interest was in the criminal investigation, the court noted that such a statement simply reflected his function under IRS procedures and that "neither the making of * * * a recommendation [for prosecution] nor the failure to make one would lessen the IRS' appropriate interest in determining whether [petitioners] were liable for deficiencies and penalties" (Pet. App. A, pp. 14a-15a).

1. In *United States* v. *LaSalle National Bank*, No. 77-365, decided June 19, 1978, the Court held that the primary requirement for enforcing a summons under 26 U.S.C. 7602 is that it be issued before the Internal Revenue Service recommends to the Department of Justice the initiation of a criminal prosecution relating to the subject matter of the summons.

The Court further ruled that enforcement of a summons is also conditioned upon the good faith use of the summons authority by the Internal Revenue Service, which must not abandon its institutional responsibility to determine and collect taxes and civil fraud penalties.

In so holding, the Court observed that "[t]he institutional responsibility of the Service to calculate and to collect civil fraud penalties and fraudulently reported or unreported taxes is not necessarily overturned by a single agent who attempts to build a criminal case. The review process over and above his conclusions is multilayered and thorough" (slip op. 16). The Court further stated that "this means that those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service" (slip op. 18). The Court characterized this burden as "a heavy one"; "[b]ecause criminal and civil fraud liabilities are coterminous, the Service rarely will be found to have acted in bad faith by pursuing the former" (*ibid.*).

Here, the special agent's and the revenue agent's affidavits amply supported the court of appeals' conclusion that "petitioners made no showing sufficient to call for an evidentiary hearing or discovery on whether the summons was to be used solely to develop evidence for prosecution" (Pet. App. A, p. 14a). Indeed, the sworn statements of the agents that the summons was issued for both civil and criminal purposes was uncontested. Moreover, the dual character of the investigation is further demonstrated here by

the fact that a revenue agent, whose function is to determine civil tax liability, is assigned to the case. Finally, the agents swore that there had been no determination whether to recommend either criminal prosecution or the assessment of additional civil liabilities or fraud penalties. In these circumstances, petitioners have not met their burden of proving that the Internal Revenue Service has abandoned its institutional responsibility to determine and collect taxes.[1]

2. Contrary to petitioners' further argument (Pet. 9-13), the decision below does not conflict with *United States* v. *McCarthy*, 514 F.2d 368 (C.A. 3). There, the court held that the taxpayers were entitled to an evidentiary hearing with respect to their allegations of lack of good faith in issuance of an internal reve-

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[1] Petitioners' assertion (Pet. 12) that they were previously audited for 1972 and 1974, two of the years under investigation, with no change in their reported tax liability does not rebut the presumption in favor of a civil aspect to the Service's inquiry. As the court of appeals observed (Pet. App. A, p. 6a n. 3), the government disclaimed any request for enforcement of the summons with respect to 1972. Moreover, contrary to petitioners' argument (Pet. 12), *Couch* v. *United States*, 409 U.S. 322, 329 n. 9, does not support their claim that the year 1972 is still at issue. The Court's statement in *Couch* that the "rights and obligations of the parties became fixed when the summons was served" refers to the inability of the possessor of records requested by a summons to defeat enforcement by transferring the records to another person.

With respect to 1974, the Internal Revenue Service notified petitioners, pursuant to 26 U.S.C. 7605(b), that further information made it necessary to reexamine their books and records for that year (see Pet. App. A, p. 6a). There is accordingly no basis for petitioners' claim that their prior audit terminated the civil aspect of the investigation.

nue summons on the ground of harassment.[3] Here, however, petitioners have not alleged any harassment or other improper purpose that might justify an evidentiary hearing. *United States* v. *Powell*, *supra*; *United States* v. *LaSalle National Bank*, *supra*, slip op. 15; cf. *United States* v. *Church of Scientology of California*, 520 F.2d 818 (C.A. 9); *United States* v. *Salter*, 432 F.2d 697 (C.A. 1). The only fact alleged by petitioners is that Special Agent Dombroski stated that his only remaining interest was in the criminal investigation of Roger Keech, although Dombroski denied using the term "criminal." But as this Court pointed out in *LaSalle National Bank*, "the inquiry into the criminal enforcement objectives of the agent would delay summons enforcement proceedings while parties clash over, and judges grapple with, the thought processes of each investigator" (footnote omitted) (slip op. 17)—a process the Court characterized as "undesirable and unrewarding" (slip op. 18). Petitioners have therefore alleged no fact that would disprove the existence of a valid civil tax determination or collection purpose by the Internal Revenue Service. There is accordingly no basis to their claim for an evidentiary hearing.

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[3] In *McCarthy*, the taxpayers also alleged, as do petitioners here, that a prior audit demonstrated that the current investigation was not being conducted in good faith as a civil investigation. However, the court found that these allegations were insufficient to raise the possibility of bad faith, observing that there was no claim that the Service had pursued all available civil remedies with respect to each of the years currently under investigation, including fraud penalties (see 514 F.2d at 375).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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